

ASSEMBLY BILL

No. 1826

Introduced by Assembly Member Beall

January 18, 2008

An act to amend Section 11488.5 of the Health and Safety Code, to amend Section 12028.5 of the Penal Code, and to amend Section 8102 of the Welfare and Institutions Code, relating to seized property.

LEGISLATIVE COUNSEL'S DIGEST

AB 1826, as introduced, Beall. Seized property: fees.

Existing law authorizes the seizure of property in connection with certain controlled substance offenses, and provides a procedure for persons claiming an interest in the seized property to seek return of the property. Existing law provides that no filing fee be charged where the subject property is valued at \$5,000 or less.

This bill would authorize imposition of a \$320 filing fee, as specified, in those claim cases where the subject property is valued at \$5,000 or more.

Existing law authorizes the seizure of weapons in certain cases involving domestic violence, as specified. Existing law authorizes law enforcement to petition the court under certain circumstances to determine if firearms seized in those cases should be returned.

This bill would authorize imposition of a \$320 filing fee under specified circumstances to be paid by a person seeking return of the seized firearm.

Existing law authorizes the seizure of deadly weapons, as specified, from persons who are detained for examination of their mental condition, or from persons admitted to a medical facility for mental health treatment, or adjudicated as having a mental illness or being a mentally

disordered sex offender, as specified. Existing law authorizes law enforcement to petition the court under certain circumstances to determine if firearms seized in those cases should be returned.

This bill would authorize imposition of a \$320 filing fee under specified circumstances to be paid by a person seeking return of the seized firearm.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11488.5 of the Health and Safety Code
2 is amended to read:

3 11488.5. (a) (1) Any person claiming an interest in the
4 property seized pursuant to Section 11488 may, unless for good
5 cause shown the court extends the time for filing, at any time within
6 30 days from the date of the first publication of the notice of
7 seizure, if that person was not personally served or served by mail,
8 or within 30 days after receipt of actual notice, file with the
9 superior court of the county in which the defendant has been
10 charged with the underlying or related criminal offense or in which
11 the property was seized or, if there was no seizure, in which the
12 property is located, a claim, verified in accordance with Section
13 446 of the Code of Civil Procedure, stating his or her interest in
14 the property. An endorsed copy of the claim shall be served by the
15 claimant on the Attorney General or district attorney, as
16 appropriate, within 30 days of the filing of the claim. The Judicial
17 Council shall develop and approve official forms for the verified
18 claim that is to be filed pursuant to this section. The official forms
19 shall be drafted in nontechnical language, in English and in
20 Spanish, and shall be made available through the office of the clerk
21 of the appropriate court.

22 (2) Any person who claims that the property was assigned to
23 him or to her prior to the seizure or notification of pending
24 forfeiture of the property under this chapter, whichever occurs
25 first, shall file a claim with the court and prosecuting agency
26 pursuant to Section 11488.5 declaring an interest in that property
27 and that interest shall be adjudicated at the forfeiture hearing. The
28 property shall remain under control of the law enforcement or
29 prosecutorial agency until the adjudication of the forfeiture hearing.

1 Seized property shall be protected and its value shall be preserved
2 pending the outcome of the forfeiture proceedings.

3 (3) The clerk of the court shall not charge or collect a fee for
4 the filing of a claim in any case in which the value of the
5 respondent property as specified in the notice is five thousand
6 dollars (\$5,000) or less. *If the value of the property, as specified*
7 *in the notice, is more than five thousand dollars (\$5,000), the clerk*
8 *of the court shall charge the filing fee specified in Section 70611*
9 *of the Government Code.*

10 (4) The claim of a law enforcement agency to property seized
11 pursuant to Section 11488 or subject to forfeiture shall have priority
12 over a claim to the seized or forfeitable property made by the
13 Franchise Tax Board in a notice to withhold issued pursuant to
14 Section 18817 or 26132 of the Revenue and Taxation Code.

15 (b) (1) If at the end of the time set forth in subdivision (a)
16 there is no claim on file, the court, upon motion, shall declare the
17 property seized or subject to forfeiture pursuant to subdivisions
18 (a) to (g), inclusive, of Section 11470 forfeited to the state. In
19 moving for a default judgment pursuant to this subdivision, the
20 state or local governmental entity shall be required to establish a
21 prima facie case in support of its petition for forfeiture.

22 (2) The court shall order the forfeited property to be distributed
23 as set forth in Section 11489.

24 (c) (1) If a verified claim is filed, the forfeiture proceeding
25 shall be set for hearing on a day not less than 30 days therefrom,
26 and the proceeding shall have priority over other civil cases. Notice
27 of the hearing shall be given in the same manner as provided in
28 Section 11488.4. Such a verified claim or a claim filed pursuant
29 to subdivision (j) of Section 11488.4 shall not be admissible in the
30 proceedings regarding the underlying or related criminal offense
31 set forth in subdivision (a) of Section 11488.

32 (2) The hearing shall be by jury, unless waived by consent of
33 all parties.

34 (3) The provisions of the Code of Civil Procedure shall apply
35 to proceedings under this chapter unless otherwise inconsistent
36 with the provisions or procedures set forth in this chapter. However,
37 in proceedings under this chapter, there shall be no joinder of
38 actions, coordination of actions, except for forfeiture proceedings,
39 or cross-complaints, and the issues shall be limited strictly to the
40 questions related to this chapter.

(d) (1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4.

(2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4.

(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630, inclusive, of the Code of Civil Procedure if a trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto.

If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant.

(f) All seized property which was the subject of a contested forfeiture hearing and which was not released by the court to a claimant shall be declared by the court to be forfeited to the state, provided the burden of proof required pursuant to subdivision (i)

1 of Section 11488.4 has been met. The court shall order the forfeited
2 property to be distributed as set forth in Section 11489.

3 (g) All seized property which was the subject of the forfeiture
4 hearing and which was not forfeited shall remain subject to any
5 order to withhold issued with respect to the property by the
6 Franchise Tax Board.

7 SEC. 2. Section 12028.5 of the Penal Code is amended to read:
8 12028.5. (a) As used in this section, the following definitions
9 shall apply:

10 (1) "Abuse" means any of the following:

11 (A) Intentionally or recklessly to cause or attempt to cause
12 bodily injury.

13 (B) Sexual assault.

14 (C) To place a person in reasonable apprehension of imminent
15 serious bodily injury to that person or to another.

16 (D) To molest, attack, strike, stalk, destroy personal property,
17 or violate the terms of a domestic violence protective order issued
18 pursuant to Part 4 (commencing with Section 6300) of Division
19 10 of the Family Code.

20 (2) "Domestic violence" means abuse perpetrated against any
21 of the following persons:

22 (A) A spouse or former spouse.

23 (B) A cohabitant or former cohabitant, as defined in Section
24 6209 of the Family Code.

25 (C) A person with whom the respondent is having or has had a
26 dating or engagement relationship.

27 (D) A person with whom the respondent has had a child, where
28 the presumption applies that the male parent is the father of the
29 child of the female parent under the Uniform Parentage Act (Part
30 3 (commencing with Section 7600) of Division 12 of the Family
31 Code).

32 (E) A child of a party or a child who is the subject of an action
33 under the Uniform Parentage Act, where the presumption applies
34 that the male parent is the father of the child to be protected.

35 (F) Any other person related by consanguinity or affinity within
36 the second degree.

37 (3) "Deadly weapon" means any weapon, the possession or
38 concealed carrying of which is prohibited by Section 12020.

39 (b) A sheriff, undersheriff, deputy sheriff, marshal, deputy
40 marshal, or police officer of a city, as defined in subdivision (a)

1 of Section 830.1, a peace officer of the Department of the
2 California Highway Patrol, as defined in subdivision (a) of Section
3 830.2, a member of the University of California Police Department,
4 as defined in subdivision (b) of Section 830.2, an officer listed in
5 Section 830.6 while acting in the course and scope of his or her
6 employment as a peace officer, a member of a California State
7 University Police Department, as defined in subdivision (c) of
8 Section 830.2, a peace officer of the Department of Parks and
9 Recreation, as defined in subdivision (f) of Section 830.2, a peace
10 officer, as defined in subdivision (d) of Section 830.31, a peace
11 officer, as defined in subdivisions (a) and (b) of Section 830.32,
12 and a peace officer, as defined in Section 830.5, who is at the scene
13 of a domestic violence incident involving a threat to human life
14 or a physical assault, shall take temporary custody of any firearm
15 or other deadly weapon in plain sight or discovered pursuant to a
16 consensual or other lawful search as necessary for the protection
17 of the peace officer or other persons present. Upon taking custody
18 of a firearm or other deadly weapon, the officer shall give the
19 owner or person who possessed the firearm a receipt. The receipt
20 shall describe the firearm or other deadly weapon and list any
21 identification or serial number on the firearm. The receipt shall
22 indicate where the firearm or other deadly weapon can be
23 recovered, the time limit for recovery as required by this section,
24 and the date after which the owner or possessor can recover the
25 firearm or other deadly weapon. No firearm or other deadly weapon
26 shall be held less than 48 hours. Except as provided in subdivision
27 (f), if a firearm or other deadly weapon is not retained for use as
28 evidence related to criminal charges brought as a result of the
29 domestic violence incident or is not retained because it was illegally
30 possessed, the firearm or other deadly weapon shall be made
31 available to the owner or person who was in lawful possession 48
32 hours after the seizure or as soon thereafter as possible, but no
33 later than five business days after the owner or person who was in
34 lawful possession demonstrates compliance with Section 12021.3.
35 In any civil action or proceeding for the return of firearms or
36 ammunition or other deadly weapon seized by any state or local
37 law enforcement agency and not returned within five business days
38 following the initial seizure, except as provided in subdivision (d),
39 the court shall allow reasonable attorney's fees to the prevailing
40 party.

1 (c) Any peace officer, as defined in subdivisions (a) and (b) of
2 Section 830.32, who takes custody of a firearm or deadly weapon
3 pursuant to this section shall deliver the firearm within 24 hours
4 to the city police department or county sheriff's office in the
5 jurisdiction where the college or school is located.

6 (d) Any firearm or other deadly weapon that has been taken into
7 custody that has been stolen shall be restored to the lawful owner,
8 as soon as its use for evidence has been served, upon his or her
9 identification of the firearm or other deadly weapon and proof of
10 ownership, and after the law enforcement agency has complied
11 with Section 12021.3.

12 (e) Any firearm or other deadly weapon taken into custody and
13 held by a police, university police, or sheriff's department or by
14 a marshal's office, by a peace officer of the Department of the
15 California Highway Patrol, as defined in subdivision (a) of Section
16 830.2, by a peace officer of the Department of Parks and
17 Recreation, as defined in subdivision (f) of Section 830.2, by a
18 peace officer, as defined in subdivision (d) of Section 830.31, or
19 by a peace officer, as defined in Section 830.5, for longer than 12
20 months and not recovered by the owner or person who has lawful
21 possession at the time it was taken into custody, shall be considered
22 a nuisance and sold or destroyed as provided in subdivision (c) of
23 Section 12028. Firearms or other deadly weapons not recovered
24 within 12 months due to an extended hearing process as provided
25 in subdivision (j), are not subject to destruction until the court
26 issues a decision, and then only if the court does not order the
27 return of the firearm or other deadly weapon to the owner.

28 (f) In those cases in which a law enforcement agency has
29 reasonable cause to believe that the return of a firearm or other
30 deadly weapon would be likely to result in endangering the victim
31 or the person reporting the assault or threat, the agency shall advise
32 the owner of the firearm or other deadly weapon, and within 60
33 days of the date of seizure, initiate a petition in superior court to
34 determine if the firearm or other deadly weapon should be returned.
35 The law enforcement agency may make an ex parte application
36 stating good cause for an order extending the time to file a petition.
37 Including any extension of time granted in response to an ex parte
38 request, a petition must be filed within 90 days of the date of
39 seizure of the firearm or other deadly weapon.

(g) The law enforcement agency shall inform the owner or person who had lawful possession of the firearm or other deadly weapon, at that person's last known address by registered mail, return receipt requested, that he or she has 30 days from the date of receipt of the notice to respond to the court clerk to confirm his or her desire for a hearing, and that the failure to respond shall result in a default order forfeiting the confiscated firearm or other deadly weapon. For the purposes of this subdivision, the person's last known address shall be presumed to be the address provided to the law enforcement officer by that person at the time of the family violence incident. In the event the person whose firearm or other deadly weapon was seized does not reside at the last address provided to the agency, the agency shall make a diligent, good faith effort to learn the whereabouts of the person and to comply with these notification requirements.

(h) If the person requests a hearing, the court clerk shall set a hearing no later than 30 days from receipt of that request. *If the request for a hearing is the first responsive paper as described in Section 70612 of the Government Code, the clerk shall charge the fee prescribed in that section.* The court clerk shall notify the person, the law enforcement agency involved, and the district attorney of the date, time, and place of the hearing. Unless it is shown by a preponderance of the evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of the firearm or other deadly weapon and shall award reasonable attorney's fees to the prevailing party.

(i) If the person does not request a hearing or does not otherwise respond within 30 days of the receipt of the notice, the law enforcement agency may file a petition for an order of default and may dispose of the firearm or other deadly weapon as provided in Section 12028.

(j) If, at the hearing, the court does not order the return of the firearm or other deadly weapon to the owner or person who had lawful possession, that person may petition the court for a second hearing within 12 months from the date of the initial hearing. If there is a petition for a second hearing, unless it is shown by clear and convincing evidence that the return of the firearm or other deadly weapon would result in endangering the victim or the person reporting the assault or threat, the court shall order the return of

1 the firearm or other deadly weapon and shall award reasonable
2 attorney's fees to the prevailing party. If the owner or person who
3 had lawful possession does not petition the court within this
4 12-month period for a second hearing or is unsuccessful at the
5 second hearing in gaining return of the firearm or other deadly
6 weapon, the firearm or other deadly weapon may be disposed of
7 as provided in Section 12028.

8 (k) The law enforcement agency, or the individual law
9 enforcement officer, shall not be liable for any act in the good faith
10 exercise of this section.

11 SEC. 3. Section 8102 of the Welfare and Institutions Code is
12 amended to read:

13 8102. (a) Whenever a person, who has been detained or
14 apprehended for examination of his or her mental condition or
15 who is a person described in Section 8100 or 8103, is found to
16 own, have in his or her possession or under his or her control, any
17 firearm whatsoever, or any other deadly weapon, the firearm or
18 other deadly weapon shall be confiscated by any law enforcement
19 agency or peace officer, who shall retain custody of the firearm
20 or other deadly weapon.

21 "Deadly weapon," as used in this section, has the meaning
22 prescribed by Section 8100.

23 (b) Upon confiscation of any firearm or other deadly weapon
24 from a person who has been detained or apprehended for
25 examination of his or her mental condition, the peace officer or
26 law enforcement agency shall notify the person of the procedure
27 for the return of any firearm or other deadly weapon which has
28 been confiscated.

29 Where the person is released, the professional person in charge
30 of the facility, or his or her designee, shall notify the person of the
31 procedure for the return of any firearm or other deadly weapon
32 which may have been confiscated.

33 Health facility personnel shall notify the confiscating law
34 enforcement agency upon release of the detained person, and shall
35 make a notation to the effect that the facility provided the required
36 notice to the person regarding the procedure to obtain return of
37 any confiscated firearm.

38 (c) Upon the release of a person as described in subdivision (b),
39 the confiscating law enforcement agency shall have 30 days to
40 initiate a petition in the superior court for a hearing to determine

1 whether the return of a firearm or other deadly weapon would be
2 likely to result in endangering the person or others, and to send a
3 notice advising the person of his or her right to a hearing on this
4 issue. The law enforcement agency may make an ex parte
5 application stating good cause for an order extending the time to
6 file a petition. Including any extension of time granted in response
7 to an ex parte request, a petition must be filed within 60 days of
8 the release of the person from a health facility.

9 (d) If the law enforcement agency does not initiate proceedings
10 within the 30-day period, or the period of time authorized by the
11 court in an ex parte order issued pursuant to subdivision (c), it
12 shall make the weapon available for return.

13 (e) The law enforcement agency shall inform the person that he
14 or she has 30 days to respond to the court clerk to confirm his or
15 her desire for a hearing, and that the failure to respond will result
16 in a default order forfeiting the confiscated firearm or weapon. For
17 the purpose of this subdivision, the person's last known address
18 shall be the address provided to the law enforcement officer by
19 the person at the time of the person's detention or apprehension.

20 (f) If the person responds and requests a hearing, the court clerk
21 shall set a hearing, no later than 30 days from receipt of the request.
22 The court clerk shall notify the person and the district attorney of
23 the date, time, and place of the hearing. *If the request for a hearing*
24 *is the first responsive paper as described in Section 70612 of the*
25 *Government Code, the clerk shall charge the fee prescribed in that*
26 *section.*

27 (g) If the person does not respond within 30 days of the notice,
28 the law enforcement agency may file a petition for order of default.